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Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

JOSE LUIS PERDOMO PADILLA, *Petitioner*,

v.

JOHN ASHCROFT, ATTORNEY GENERAL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the filing of an application for citizenship and its concomitant oath of allegiance can constitute sufficiently compelling evidence of permanent allegiance to the United States to confer national status within the meaning of 8 U.S.C. § 1101(a)(22)(B), or instead, as the Ninth Circuit held, a person may become a national of the United States only through birth or naturalization.

## LIST OF PARTIES

The petitioner is Jose Luis Perdomo Padilla. The respondent is John Ashcroft, Attorney General for the State of California.

## TABLE OF CONTENTS


Page

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISION INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

REASONS FOR GRANTING THE WRIT ..... 7

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH RELEVANT DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON AN IMPORTANT QUESTION OF FEDERAL LAW ..... 9

II. THIS CASE RAISES A QUESTION OF EXCEPTIONAL IMPORTANCE THAT MERITS REVIEW BY THIS COURT ..... 15

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

*Asemani v. Islamic Republic of Iran*,
266 F. Supp. 2d 24 (D.D.C. 2003) ..... 16

*Carreon-Hernandez v. Levi*,
543 F.2d 637 (8th Cir. 1976) ..... 11, 12, 16

*Hampton v. Mow Sun Wong*,
426 U.S. 88 (1976) ..... 5

*Hughes v. Ashcroft*,
255 F.3d 752 (9th Cir. 2001) ..... passim

*Iguarta De La Rosa v. United States*,
229 F.3d 80 (1st Cir. 2000) ..... 5, 13

*Johnson v. Eisentrager*,
339 U.S. 763 (1950) ..... 13

*Lee v. Ashcroft*,
216 F. Supp. 2d 51 (E.D.N.Y. 2002) ..... 7, 17

*Miller v. Albright*,
523 U.S. 420 (1998) ..... 5

*Oliver v. INS*,
517 F.2d 426 (2d Cir. 1975) ..... passim

*Shekoyan v. Sibley Int'l Corp.*,
217 F. Supp. 2d 59 (D.D.C. 2002) ..... 17

*Shittu v. Elwood*,
204 F. Supp. 2d 876 (E.D. Pa. 2002) ..... 17

*Sierra-Reyes v. INS*,
585 F.2d 762 (5th Cir. 1978) ..... 10

*United States v. Morin*,
80 F.3d 124 (4th Cir. 1996) ..... passim

*United States v. Sotelo*,
109 F.3d 1446 (9th Cir. 1997) ..... 5, 10

## TABLE OF AUTHORITIES (continued)

**Page(s)**

### STATUTES

18 U.S.C. § 2332(a) .....11, 12
28 U.S.C. § 1254(1) .....1
8 U.S.C. § 1101(a)(22).....1, 9, 11, 12
8 U.S.C. § 1101(a)(22)(B)..... passim
8 U.S.C. § 1101(a)(23).....14
8 U.S.C. § 1101(a)(3).....9
8 U.S.C. § 1227.....10
8 U.S.C. § 1408.....14
8 U.S.C. § 1408(a) .....17
8 U.S.C. § 1481.....14
8 U.S.C. § 1481(a) .....15

## OPINIONS BELOW

The Board of Immigration Appeals' opinion (Pet. App. 16b-17b) is unpublished. The Ninth Circuit's opinion (Pet. App. 1a-15a) is published at 333 F.3d 964.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Appendix (Pet. App. 18c) reproduces the provision of 8 U.S.C. § 1101(a)(22) involved in this case.

## STATEMENT OF THE CASE

### Factual and Procedural Background

Petitioner Perdomo Padilla, a Mexican citizen, legally entered the United States through the Port of Entry in San Ysidro, California, and became a lawful permanent resident of the United States in October 1982. Perdomo Padilla worked and lived legally and continuously in the United States for 26 years. During that time, he married a legal permanent resident woman, severed all ties to his native land of Mexico, and fathered four United States citizen children, one of whom serves in the United States Armed Forces.

In July 1997, 21 years after he lawfully entered the United States, Perdomo Padilla filed an application for naturalization. In that application, Perdomo Padilla swore under penalty of perjury of the laws of the United States that he satisfied the mandatory eligibility requirements for

naturalized citizenship and further swore that he (1) believes in the Constitution and the form of government in the United States; (2) is willing to bear arms on behalf of the United States; (3) is willing to perform noncombatant services in the Armed Forces of the United States; (4) is willing to perform work of national importance under civilian direction; and (5) will take the public Oath of Allegiance upon naturalization. Pet. App. 3a.

In January 1999, Perdomo Padilla was arrested in California and charged with possession with intent to distribute marijuana. He pleaded guilty to one count of conspiracy to distribute marijuana and was sentenced to a term of 30 months. AR 85-86; 94-103.[1]

In January 2001, while Perdomo Padilla's application for naturalization was still pending, the Immigration and Naturalization Service ("INS") initiated removal proceedings against him. Perdomo Padilla appeared before an Immigration Judge ("IJ") hearing, and the IJ found him removable on the basis that he was an alien who had been convicted of an aggravated felony. Pet. App. 3a. The IJ also found Perdomo Padilla was ineligible for relief from deportation. AR 37-38.

Shortly after the IJ's decision issued, the Ninth Circuit issued its decision in *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001), in which that court determined that in order for a person born outside the United States to qualify for "national" status within the meaning of 8 U.S.C. § 1101(a)(22)(B) such that he is not removable as an alien, "the person must, at a minimum, demonstrate (1)

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1 "AR" refers to the Administrative Record and is attached to Perdomo Padilla's Excerpts of Record ("ER") filed concurrently with his Supplemental Opening Brief to the Ninth Circuit.

birth in a United States territory or (2) an application for United States citizenship." *Id.* at 757. Relying on *Hughes*, Perdomo Padilla appealed to the Board of Immigration Appeals ("BIA") and argued that he was a national, thus not an alien subject to removal for the commission of an aggravated felony. Specifically, Perdomo Padilla argued that his previously filed application for naturalization constitutes sufficiently compelling objective evidence of his permanent allegiance to the United States to confer national status. The BIA rejected Perdomo Padilla's argument and affirmed the IJ's decision. Pet. App. 15a-16a.

In April 2002, nearly five years after it was filed, the INS denied Perdomo Padilla's application for naturalization on the basis that the commission of an aggravated felony rendered him no longer of good moral character and thus ineligible for naturalized citizenship. The BIA dismissed Perdomo Padilla's appeal of the denial.

**Ninth Circuit's Opinion Below**

Perdomo Padilla appealed the BIA's decision to the Ninth Circuit and again invoked that court's holding in *Hughes v. Ashcroft*. Specifically, Perdomo Padilla argued that he was a national because his naturalization application contained an unqualified declaration of allegiance to the United States and, thus, affirmatively and objectively demonstrated his allegiance within the meaning of 8 U.S.C. § 1101(a)(22)(B). Perdomo Padilla surveyed the decisions of the Second, Fourth, Eighth and Ninth Circuits, and at least two district courts, which have recognized the legal significance of the filing of an application for naturalization and its concomitant oath of allegiance and, in so doing, have rejected the contention that national status must necessarily be attained by birth alone. Perdomo Padilla argued that while the term "national" historically applies to

persons born in U.S. territories, nothing in modern pertinent statutory or decisional authorities purports to restrict national status to members of that group alone.

Perdomo Padilla further argued that whether or not an application for naturalization constitutes sufficiently compelling evidence of allegiance to confer national status in every case, additional indicia of allegiance, including, among others, his lawful entry, 21-year-long legal permanent residence, marriage to a legal permanent resident wife and four U.S. citizen children combined to support a finding of nationality in his case.

In rejecting Perdomo Padilla's construction of the term "national," the Ninth Circuit acknowledged that a number of other Circuit courts had weighed in on the meaning of the term. The court expressly noted that the Fourth Circuit, in construing the same statute at issue here, found that "'an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself'" and, on that basis, found that a permanent resident who had completed an application for naturalization was a national of the United States within the meaning of 8 U.S.C. § 1101(a)(22)(B). Pet. App. 14a (quoting *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996)). The court further recognized support among the district courts for Perdomo Padilla's construction. Pet. App. 14a-15a.

Nevertheless, in creating a direct and acknowledged conflict with the Fourth Circuit's decision in *Morin* (Pet. App. 14a), the Ninth Circuit retreated from its analysis in *Hughes*, and broadly concluded that the filing of an application for naturalization does not confer national status because under the Immigration and Nationality Act ("INA"), "a person may become a 'national of the United States' only through birth or naturalization." Pet. App. 15a. In so doing,

the Ninth Circuit relied exclusively on the traditional meaning of the term "national" and on statutory provisions relating to the acquisition, status and loss of nationality acquired by birth, and ignored long-standing case law in the Second and Eighth Circuits, which have recognized that nationality under Section 1101(a)(22)(B) is not necessarily limited by birth or naturalization. Pet. App. 13a-15a.

First, the Ninth Circuit noted that, traditionally, only persons born in territories of the United States were non-citizen nationals and that the term "national" came into "popular use" in this country when the United States acquired territories outside its continental limits and was used in reference to non-citizen inhabitants of those territories. Pet. App. 7a. The court revisited its earlier holding that "'[a]lthough we have not definitely defined the term national, we have suggested a person attains national status primarily through birth.'" Pet. App. 7a (quoting *United States v. Sotelo*, 109 F.3d 1446, 1448 (9th Cir. 1997)). The court cited footnotes from decisions in this Court as well as the First and Second Circuits characterizing non-citizen nationals as those born in U.S. territories to lend additional support to its construction.[2]

Second, the Ninth Circuit examined the statutory text and context of 8 U.S.C. § 1101(a)(22)(B) and concluded that

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2 None of the cited cases squarely confronts the issue presented here, nor do they actually adjudicate the meaning of, or impose limitations on, the term national. *See, e.g.*, *Miller v. Albright*, 523 U.S. 420, 467 n.2, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (Ginsburg, J., dissenting); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 n.1, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976); *Iguarta De La Rosa v. United States*, 229 F.3d 80, 86 n.12 (1st Cir. 2000) (per curiam) (Torruella, J., concurring); *Oliver v. INS*, 517 F.2d 426, 428 n.3 (2d Cir. 1975).

any allegiance that may be owed by virtue of a naturalization application is not permanent to the extent the application can be subsequently withdrawn or denied. The court relied on several statutory provisions that govern the acquisition of nationality by birth and naturalized citizenship after birth to conclude that, to the extent Congress made no mention of the acquisition of nationality after birth by means other than through naturalized citizenship, a person can become a national only by birth or by completing the process of becoming a naturalized citizen.[3] Pet. App. 9a-12a.

Third, the court turned to its holding in *Hughes*, wherein the Ninth Circuit invoked the Fourth Circuit's holding in *Morin* to conclude that, to qualify as a national, a person must, at a minimum demonstrate birth in a United States territory or an application for citizenship. The court stated that while the *Hughes* court indicated that additional facts may or may not be required to establish permanent allegiance, it declined to reach the issue of whether and to what extent an application for naturalization is sufficient to confer national status and, as such, the question remained an open one. Pet. App. 13a.

Finally, the Ninth Circuit turned to the Fourth Circuit's holding in *Morin*. As stated, the court expressly acknowledged the Fourth Circuit's holding that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself" (*Morin*, 80 F.3d at 126), and that "*Morin* is

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3 At no point did the court construe the plain meaning of the text in Section 1101(a)(22)(B) – namely, that a national is a person who, though not a citizen [naturalized or by birth] of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B).

directly on point." Pet. App. 14a. However, according to the court, because the Fourth Circuit did not discuss the traditional meaning of the term "national" or the apparent inconsistencies with other statutory provisions, *Morin* was not persuasive. The court further recognized that at least one of the district court cases Perdomo Padilla cited, *Lee v. Ashcroft*, 216 F. Supp. 2d 51 (E.D.N.Y. 2002), supports his construction but rejected it on the basis that that court, too, failed to properly analyze the proper clues as to the meaning of "national of the United States." Pet. App. 14a-15a.

Notably, the Ninth Circuit did not address the holdings of the Second and the Eighth Circuits, which have recognized, albeit implicitly so, that nationality can be attained through means other than by birth or naturalization alone. Perhaps more significantly, the Ninth Circuit did not address whether and to what extent the filing of an application for naturalization may constitute one factor among many such that, when combined with other objective indicia of allegiance, a finding of nationality may be made. Nor did it consider whether such additional indicia of allegiance are sufficient to confer national status in Perdomo Padilla's case. Rather, notwithstanding the facts and circumstances surrounding a particular case, the court created a blanket rule that the filing of an application for naturalization and its concomitant oath of allegiance can never constitute permanent allegiance or give rise to a finding of nationality.

## REASONS FOR GRANTING THE WRIT

This Court has never addressed the question of whether the filing of an application for citizenship and its concomitant oath of allegiance can constitute sufficiently compelling evidence of permanent allegiance to the United

States to confer national status within the meaning of 8 U.S.C. § 1101(a)(22)(B). The question of who is and who is not a national of the United States is an issue of critical importance, the resolution of which has implications not only in the context of immigration law but in other contexts as well.

The Ninth Circuit's new rule creates an irreconcilable split among the Circuit courts, which must be resolved by this Court. The Ninth Circuit's new rule that no person may become a national of the United States except by virtue of birth or naturalized citizenship creates a direct and acknowledged conflict with the Fourth Circuit's decision in *Morin*, and is fundamentally inconsistent with long-standing law in the Second and Eighth Circuits. Specifically, the Ninth Circuit's categorical rule directly contravenes the rule in the Fourth Circuit that the filing of an application for citizenship by a lawful permanent resident constitutes sufficiently compelling evidence of allegiance to the United State to confer national status.

The Ninth Circuit's categorical decision further conflicts with the decisions of the Second and Eighth Circuits, which have consistently recognized the legal significance of the filing of an application for citizenship and, in so doing, have rejected the contention that a person may attain national status solely by virtue of birth or naturalization. Indeed, the Ninth Circuit stands alone among Circuit courts in expressly holding that one may become a national by virtue of birth alone, and the majority of district courts have followed the existing rule set by the Fourth Circuit. On the Ninth Circuit's reasoning, a long-term lawful permanent resident who has lived and worked a lifetime in the United States and who officially demonstrates objective evidence of permanent allegiance to the United States by filing an application for citizenship can be stripped of his

status and subjected to removal, while those who by virtue of birth in a U.S. territory and who may have no connection to the United States are accorded near-full rights of citizenship.

This Court should not tolerate a split among Circuits on such a fundamental question as nationality. Intervention is necessary to ensure uniformity among the lower courts and to forestall jurisprudential chaos.

At minimum, the Ninth Circuit's categorical rule that, notwithstanding the facts and circumstances surrounding a particular case or other objective indicia of allegiance, an application for citizenship and its concomitant oath can never give rise to a finding of nationality must be corrected. The lower courts should not be barred, by virtue of the Ninth Circuit's new rule, from considering all objective indicia of permanent allegiance, including the filing of a naturalization application.

## I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH RELEVANT DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON AN IMPORTANT QUESTION OF FEDERAL LAW

The Ninth Circuit's sweeping conclusion that a person may become a national of the United States solely through birth or naturalization creates a significant and fundamental conflict with established law in the Second, Fourth and Eighth Circuits, which have recognized the legal significance of the filing of an application for citizenship and its concomitant oath of allegiance and, in so doing, have rejected the contention that nationality necessarily must be attained by birth or naturalized citizenship.

Title 8 U.S.C. § 1101(a)(3) defines an alien as "any person not a citizen or national of the United States." In turn, 8 U.S.C. § 1101(a)(22) defines "national of the United States" as "(A) a citizen of the United States, or (B) a person

who, though not a citizen of the United States, owes permanent allegiance to the United States." Only aliens are removable. 8 U.S.C. § 1227.

Circuit courts that have addressed the issue agree that the category of non-citizen national of the United States is a constricted one. Indeed, it is well settled that one cannot become a national of the United States simply by virtue of lengthy residence alone, or by entering the United States illegally and maintaining a subjective allegiance to the United States. *See, e.g., Sotelo*, 109 F.3d at 1448 (alien's subjective belief that he owed allegiance to the United States was insufficient to establish that he was a national); *Sierra-Reyes v. INS*, 585 F.2d 762, 764 (5th Cir. 1978) (alien's claim to citizenship based on long residency in the United States and lack of allegiance to any other country was insufficient to confer status as national where individual had never filed petition for naturalization). Rather, Circuit courts that have construed Section 1101(a)(22)(B) require an official, objective demonstration of permanent allegiance to the United States.

In *Oliver*, the Second Circuit considered whether petitioner, who was born in Canada, lawfully entered the United States at age 10, and became a permanent legal resident, was a national within the meaning of Section 1101(a)(22)(B). 517 F.2d at 427. Petitioner had lived in the United States for 20 years, married and had children with one United States citizen, divorced, and married another United States citizen. After petitioner was convicted of a narcotics offense, the INS sought to deport her. She argued that, based on her lengthy residence in the United States since early childhood, she owed allegiance to the United States and was thus a "national." *Id.*

In rejecting petitioner's argument, the Second Circuit reasoned that she owed allegiance to Canada and not the

United States because she had failed to begin the naturalization process and thereby officially declare her allegiance to the United States. *Id.* at 427-428. The Second Circuit reached this conclusion notwithstanding its observation that, historically, the term "national" applied to inhabitants of U.S. territories, and that the primary way to become a national was through birth. *Id.* at 427 n.3.

In *Carreon-Hernandez v. Levi*, the Eighth Circuit adopted the reasoning of the Second Circuit's decision in *Oliver* and concluded that a permanent resident alien who entered the United States legally, lived and worked in this country for 20 years, and during that time married a citizen and fathered a U.S. citizen son, could not qualify as a national because he had never begun the naturalization process. 543 F.2d 637, 638 (8th Cir. 1976) (affirming and adopting the district court's opinion at 409 F. Supp. 1208 (D. Minn. 1976)). The Eighth Circuit noted that while prior to his conviction, appellant had "lived an exemplary life, working, paying taxes, registering for the Selective Service, etc.," he had never applied for United States citizenship. *Id.*

Finally, and most significantly, the Fourth Circuit in *Morin* held that a native of Mexico who had applied for United States citizenship was a "national of the United States" for purposes of 18 U.S.C. § 2332(a), which prohibits the murder of United States nationals outside the United States. 80 F.3d at 126. In *Morin*, the defendant sought to escape his offense by alleging that his victim was not a national of the United States, but rather, a Mexican citizen. In rejecting the defendant's claim, the Fourth Circuit stated that "[c]itizenship, however, is not the sine qua non of 'nationality.'" *Id.* Rather, "[a] 'national of the United States' may also be 'a person who, though not a citizen of the United States, owes permanent allegiance to the United States.'" *Id.* (quoting 8 U.S.C. § 1101(a)(22)). The Fourth

Circuit then found that because the victim was a permanent resident alien of the United States who had applied for United States citizenship, he was indeed a "national of the United States." *Id.* According to the Fourth Circuit, "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." *Id.*

The Ninth Circuit's holding in *Perdomo Padilla* creates a direct and acknowledged conflict with the Fourth Circuit's holding in *Morin*.[4] On the Ninth Circuit's reasoning, a long-term lawful permanent resident of the United States who files an application for United States citizenship will be, at best, shielded from removal and, at worst, subject to enhanced criminal sanctions in the Fourth Circuit. That same lawful permanent resident will stand on equal footing with illegal aliens who are subject to removal and immune from prosecution under 18 U.S.C. § 2332(a) in the Ninth Circuit.

The Ninth Circuit's broad rule that a person can become a national only by birth or naturalization creates an equally significant, if not indirect, conflict with the Second and Eighth Circuit's reasoning in *Oliver* and *Carreon-Hernandez*, respectively. In both cases, the Circuit courts recognized the significance of a legal permanent resident's commencement of the naturalization process and the objective, official declaration of allegiance that process entails, and, in so doing, rejected (at least implicitly) the

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4 As the Ninth Circuit expressly acknowledged, *Morin* is "directly on point." Pet. App. 14a. Although the question of how to define "national" arose in a criminal context instead of a removal proceeding, the Fourth Circuit defined the term for purposes of 8 U.S.C. § 1101(a)(22), the same statute at issue in *Perdomo Padilla*. *Id.*

contention that nationality can be attained only by birth or citizenship. The Ninth Circuit's blanket rule, which ignores the facts and circumstances indicating allegiance in a particular case, and which rejects outright the conclusion that the filing of an application for naturalization with its concomitant oath of allegiance can constitute objective evidence of allegiance, stands in stark contrast to the law of the Second and Eighth Circuits.[5]

Indeed, while other Circuits have recognized the historic meaning of the term "national," the Ninth Circuit stands alone among the Circuits and is the only Circuit that has expressly and unequivocally concluded that a person may become a national solely by birth or naturalized citizenship.[6] Perdomo Padilla submits that this Court should

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5 Perdomo Padilla further submits that the Ninth Circuit's categorical rule is at odds with *Johnson v. Eisentrager*, in which this Court identified the application for citizenship as a significant step in the process of acquiring the full rights of citizenship. 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950) (observing that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.")

6 The First Circuit's observation in *Iguarta De La Rosa* is not to the contrary. In that case, the First Circuit summarily observed in a footnote and without supporting authority that the only persons currently holding the status of nationals are residents of American Samoa and Swains Island. 229 F.3d at 86 n.12. The First Circuit did not purport to consider, construe or otherwise adjudicate the scope and meaning of

not tolerate such a conflict among the Circuits on the fundamental question of who is and who is not a national of the United States for immigration purposes – a question that undoubtedly affects thousands upon thousands of lawful permanent residents across the country.

The Ninth Circuit's departure from the Fourth Circuit's decision in *Morin* cannot be justified by its invocation of perceived statutory inconsistencies. Pet. App. 9a-12a (discussing 8 U.S.C. § 1101(a)(23), 8 U.S.C. § 1408, 8 U.S.C. § 1481). The cited provisions govern nationality by birth or naturalized citizenship; they do not purport to construe the meaning of permanent allegiance within the meaning of subsection B of Section 1101(a)(22). That the cited provisions do not expressly provide for a method of attaining citizenship other than by birth or naturalized citizenship does not necessarily foreclose the possibility that Congress intended one. To the contrary, if Congress had intended to so restrict the definition of national to those born in U.S. territories, it could have done so expressly. It did not.

The plain meaning of subsection B cannot be ignored. A national is a person who, though not a citizen – naturalized or otherwise – owes permanent allegiance to the United States. A naturalized citizen is just that – a citizen, not one who owes permanent allegiance to the United States. Nothing in the plain language of Section 1101(a)(22)(B) purports to limit "permanent allegiance" only to those born

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the term national. To the extent that court's passing observation can be deemed to lend support to the Ninth Circuit's holding, Perdomo Padilla submits that it serves only to deepen the split among Circuits.

in U.S. territories. The Ninth Circuit did not even attempt to determine otherwise.[7]

## II. THIS CASE RAISES A QUESTION OF EXCEPTIONAL IMPORTANCE THAT MERITS REVIEW BY THIS COURT

As discussed above, the Ninth Circuit's sweeping conclusion ignores the plain language of the permanent allegiance clause to give Section 1101(a)(22)(B) a construction that has little to do with allegiance (permanent or otherwise) but instead turns on the accident of birth in a U.S. territory. In so doing, the Ninth Circuit's decision creates a direct and acknowledged conflict with the Fourth Circuit's decision in *Morin*, and is fundamentally inconsistent with long-standing law in the Second and Eighth Circuits.

The nationwide policy implications of the Ninth Circuit's new rule cannot be overstated. This is an extremely important issue potentially affecting thousands of legal permanent residents across the nation. On the Ninth Circuit's reasoning, a long-term lawful permanent resident who has lived and worked a lifetime in the United States and who officially demonstrates objective evidence of permanent allegiance to the United States by filing an application for citizenship can be stripped of his status and subjected to

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7 Arguably, 8 U.S.C. § 1481(a) supports Perdomo Padilla's construction. Section 1481(a) provides that one can lose national status by either "obtaining naturalization in a foreign state" *or* by "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state." 8 U.S.C. §§ 1481(a)(1) and (2). Thus, Congress recognized that one need not obtain full naturalization to lose nationality; rather, one could lose the same rights by virtue of a formal declaration of allegiance to a foreign state.

removal, while those who by virtue of birth in a U.S. territory and who may have no connection to the United States are accorded near-full rights of citizenship.

Moreover, if the Ninth Circuit's decision is allowed to stand, the INS will be empowered to delay ruling on a legitimate application for naturalization where, as here, the applicant is otherwise statutorily eligible for naturalization and has sworn allegiance to the United States and all that remains to be done is the public oath of allegiance. In such cases, absent recognition that the filing of an application can under some circumstances constitute sufficiently compelling evidence of allegiance, the INS can defeat Congressional intent to insulate from removal citizens and nationals by sitting on legitimate applications for years.[8]

Finally, and most critically, the conflict will lead to jurisprudential chaos. Indeed, there is already some disarray among the district courts, although most follow *Morin*. *See, e.g.*, *Asemani v. Islamic Republic of Iran*, 266 F. Supp. 2d 24, 26-27 (D.D.C. 2003) (relying on *Hughes*, *Morin*, *Oliver* and *Carreon-Hernandez* to conclude that plaintiff had

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8 Indeed, such was the case here. After lawfully living and working in this country for over 20 years, Perdomo Padilla submitted an application for naturalization. Perdomo Padilla was statutorily eligible for naturalization, had taken and passed requisite proficiency exams and had sworn, under penalty of perjury, his allegiance to the United States Constitution and its form of government (as well as a sworn willingness and ability to swear the public oath of allegiance). Once approved, all that remained to be done was the public oath of allegiance and Perdomo Padilla would have been forever protected from removal, as Congress intended. However, here the INS failed to consider Perdomo Padilla's application for nearly five years. If the INS had timely approved the application, Perdomo Padilla could never be removed.

demonstrated permanent allegiance to the United States to qualify as a national where he pursued an application for citizenship and filed an oath of allegiance to the United States); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 66-67 (D.D.C. 2002) (quoting *Morin* and stating that courts have found an application for citizenship to be "'the most compelling evidence of permanent allegiance to the United States short of citizenship itself'" and concluding that in light of this "minimal requirement," plaintiff's failure to show that he submitted such an application compelled a finding that he was not a national); *Lee,* 216 F. Supp. 2d at 57-58 (stating that "[a]t a minimum, it appears that to qualify as a national, an individual must have demonstrated his or her allegiance by applying for citizenship" and holding that petitioner objectively demonstrated allegiance to the United States by filing an application for citizenship prior to his arrest and indictment in his only criminal case); *Shittu v. Elwood*, 204 F. Supp. 2d 876 (E.D. Pa. 2002) (recognizing the split among Circuits on whether national status under Section 1101(a)(22)(B) is limited to persons born in outlying possessions as provided Section 1408(a), stating that an application for citizenship and its signed acknowledgment of the applicant's willingness and ability to take the oath of allegiance is an objective demonstration of allegiance, but concluding that commission of crime while petitioner's application was pending objectively demonstrated lack of allegiance and in so doing negated any possible inference of permanent allegiance from his naturalization application).

The Ninth Circuit's new rule will lead to substantial uncertainty among the lower courts. More importantly, courts are left with a substantial inconsistency across Circuits on the fundamental question of who is and who is not a national of the United States, not only in the context of immigration law, but also, as the *Morin* decision makes

clear, in other contexts as well. Perdomo Padilla submits that this Court should not tolerate a Circuit split on an issue so central to fundamental rights and political citizenship.

At bare minimum, Perdomo Padilla submits that the Ninth Circuit's categorical rule that, notwithstanding the facts and circumstances surrounding a particular case or other objective indicia of allegiance, an application for citizenship and its concomitant oath can never give rise to a finding of nationality must be corrected. At least, courts should not be constrained in considering all such objective indicia of permanent allegiance in determining whether a permanent resident who has applied for naturalization can qualify as a United States national.

## CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Dated: September 22, 2003

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

[Filed June 23, 2003]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-71454.

Jose Luis PERDOMO-PADILLA,

*Petitioner,*

v.

JOHN ASHCROFT, ATTORNEY GENERAL,

*Respondent.*

**Opinion**

Argued and Submitted April 7, 2003.
Filed June 23, 2003.

On Petition for Review of an Order of
the Board of Immigration Appeals.
INS No. A37-801-426.

Before Schroeder, Chief Judge,
and Thompson, and Graber,
Circuit Judges.

Opinion by Judge Graber, Circuit Judge.

Petitioner Jose Luis Perdomo Padilla, a citizen of Mexico, was convicted of conspiracy to distribute marijuana. The Immigration and Naturalization Service ("INS") instituted removal proceedings against him pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), which provides for the removal of an alien who has been convicted of an aggravated felony. Arguing that he is a "national of the United States" within the meaning of 8 U.S.C. § 1101(a)(22) because he completed an application for naturalization containing a statement of allegiance to the United States, Petitioner appeals the Board of Immigration Appeals' ("BIA") decision ordering his removal. We hold that the filing of an application for naturalization does not change an applicant's immigration status from that of an alien to that of a national because, under the Immigration and Nationality Act ("INA"), a person may become a "national of the United States" only through birth or naturalization.[1] Accordingly, we deny the petition.

## FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, a Mexican citizen, entered the United States through the Port of Entry in San Ysidro, California, and

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1. A person also may become a national of the United States (or lose his or her status as a national) under terms outlined by Congress on those rare occasions when the United States acquires or relinquishes an outlying territory. *See Rabang v. Boyd,* 353 U.S. 427, 429-30, 77 S.Ct. 985, 1 L.Ed.2d 956 (1957) (explaining the immigration-status history of inhabitants of the Philippine Islands, who became nationals when the islands were ceded to the United States by Spain, but who became aliens upon the proclamation of Philippine independence). That alternative route to nationality is not at issue here.

became a legal permanent resident of the United States in October 1982. Petitioner married another legal permanent resident and had four children, all of whom are citizens of the United States.

On July 26, 1997, Petitioner filed an application for naturalization. The application contained the following questions, to which Petitioner answered "yes":

1. Do you believe in the Constitution and form of government of the U.S.?

2. Are you willing to take the full Oath of Allegiance to the U.S.?

3. If the law requires it, are you willing to bear arms on behalf of the U.S.?

4. If the law requires it, are you willing to perform noncombatant services in the Armed Forces of the U.S.?

5. If the law requires it, are you willing to perform work of national importance under civilian direction?

In January 1999, Petitioner was arrested in California and charged with possession with intent to distribute marijuana. Petitioner pleaded guilty to one count of conspiracy to distribute marijuana.

In January 2001, the INS initiated removal proceedings against Petitioner. He appeared before an immigration judge ("IJ") hearing, and the IJ found that Petitioner was removable because he was an alien and had been convicted of an aggravated felony. The IJ also found that Petitioner was ineligible for relief from deportation.

Shortly after the IJ's decision issued, we decided *Hughes v. Ashcroft,* 255 F.3d 752 (9th Cir.2001). Petitioner argued before the BIA that, in light of *Hughes,* he was a national of the United States and thus not an alien subject to removal for commission of an aggravated felony. (He conceded that he stood convicted of an aggravated felony.)

The BIA rejected Petitioner's argument and affirmed the IJ's decision. Petitioner now appeals the BIA's decision.

## STANDARD OF REVIEW

Under 8 U.S.C. § 1252(b)(5), we review Petitioner's claim that he is a national of the United States and determine whether there is a genuine issue of material fact. *Hughes*, 255 F.3d at 755. If we conclude that there is not, we must decide Petitioner's claim; if we conclude that there is a genuine issue of material fact, we must transfer the case to the district court for a hearing. *Id.* at 755 & n. 1.[2] We review de novo the legal questions arising from Petitioner's claim that he is a national of the United States. *Id.* at 755.

## DISCUSSION

Petitioner argues that he is not an "alien" subject to removal under 8 U.S.C. § 1227(a)(2)(A)(iii), which provides for the removal of an alien who has been convicted of an aggravated felony. "Alien" is defined in 8 U.S.C. § 1101(a)(3) as "any person not a citizen or national of the United States." Title 8 U.S.C. § 1101(a)(22) defines "national of the United States" as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." Petitioner argues that he is a "national of the United States" within the meaning of § 1101(a)(22)(B) because he completed an application for naturalization that contained a statement of allegiance to the United States. In light of the historical meaning of "national" and the text and context of § 1101(a)(22), we reject Petitioner's proposed interpretation of the statute. Instead, we hold that, under the INA, a person may become a national of the United States only through birth or naturalization.

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2. Neither party argues that there is a genuine issue of material fact in this case, and we do not discern one.

A. *The BIA's Interpretation of the Statute*

In *In re Navas-Acosta,* 23 I. & N. Dec. 586, 586-87, 2003 WL 1986475 (2003), the BIA addressed whether an alien had become a national of the United States by signing a statement of allegiance to the United States as part of his application for naturalization. The BIA held that the alien was *not* a national but remained an alien because "nationality under the [INA] may be acquired only through birth or naturalization." *Id.* at 588.

The government argues that the BIA's interpretation of the statute is entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (explaining circumstances meriting deference to an agency's interpretation of a statute). The government directs our attention to *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999), in which the Supreme Court held that the Ninth Circuit should have granted *Chevron* deference to the BIA's interpretation of a provision of the INA that the BIA is expressly charged with administering.

With respect to the particular statutory provision at issue here, however, the BIA's interpretation is not entitled to deference. In *Hughes,* we held that Congress did not grant discretion to the BIA to decide questions of law related to nationality. 255 F.3d at 757-58. We relied on 8 U.S.C. § 1252(b)(5)[3] for the proposition that "the INA

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3. Title 8 U.S.C. § 1252(b)(5) provides:

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material

explicitly places the determination of nationality claims solely in the hands of the courts of appeals and (if there are questions of fact to resolve) the district courts." *Id.* at 758. Further, we noted that "[t]he review that we have conducted in past cases also illustrates that issues of law pertaining to nationality are for the court." *Id.* (discussing *Scales v. INS,* 232 F.3d 1159, 1162-63 (9th Cir.2000)). Accordingly, *Hughes* directly refutes the government's argument that *Chevron* deference must be granted to the BIA's interpretation of 8 U.S.C. § 1101(a)(22).

B. *Traditional Meaning of "National of the United States"*

All citizens of the United States are also nationals. However, some nationals are not citizens. Traditionally, only persons born in territories of the United States were non-citizen nationals. *Cabebe v. Acheson,* 183 F.2d 795, 797 (9th Cir.1950). As Justice Ginsburg recently explained:

> Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen. 8 U.S.C. § 1101(a)(22). The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island.

*Miller v. Albright,* 523 U.S. 420, 467 n. 2, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (Ginsburg, J., dissenting); *see also Hampton v. Mow Sun Wong,* 426 U.S. 88, 90 n. 1, 96 S.Ct.

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fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

1895, 48 L.Ed.2d 495 (1976) (noting that Civil Service Commission regulations construed "nationals" "who owe permanent allegiance to the United States" to cover only natives of American Samoa (citing 5 C.F.R. § 338.101 (1976))).

This court, too, has explained that non-citizen nationality has traditionally been limited to people who were born in territories of the United States: "The term 'national' came into popular use in this country when the United States acquired territories outside its continental limits, and was used in reference to noncitizen inhabitants of those territories." *Rabang v. INS,* 35 F.3d 1449, 1452 n. 5 (9th Cir.1994); *see also United States v. Sotelo,* 109 F.3d 1446, 1448 (9th Cir.1997) (quoting *Rabang* for the same principle).

Further, we have suggested that nationality may be acquired only through birth or completion of the entire naturalization process and have made no provision for a third route to nationality, such as through completion of an application for naturalization: "United States nationality depends primarily upon the place of birth, the common law principle of jus soli having been embodied in the Fourteenth Amendment of the Constitution of the United States. Nationality may also be acquired by naturalization and lost by expatriation." *Cabebe,* 183 F.2d at 797. Similarly, we have noted that, "[a]lthough we have not definitively defined the term national, we have suggested a person attains national status primarily through birth." *Sotelo,* 109 F.3d at 1448.

Other courts of appeals have also characterized non-citizen nationals as those born in territories of the United States. The Second Circuit has explained:

> The term nationals came into use in this country when the United States acquired territories outside its continental limits whose inhabitants were not at first given full political equality with citizens. Yet they were deemed to owe permanent allegiance to the United States and were entitled to our country's protection. The term national was used to include these noncitizens in the larger group of persons who

> belonged to the national community and were not regarded as aliens.

*Oliver v. INS,* 517 F.2d 426, 428 n. 3 (2d Cir.1975) (per curiam); *see also Igartua De La Rosa v. United States,* 229 F.3d 80, 86 n. 12 (1st Cir.2000) (per curiam) (Torruella, J., concurring) (noting that only residents of American Samoa and Swains Island are nationals of the United States within the meaning of 8 U.S.C. § 1101(a)(22)).

Thus, decisions of the Supreme Court, this court, and other courts of appeals all suggest that the term "national," when used to describe non- citizens, refers only to those born in territories of the United States.

C. *Text and Context of § 1101(a)(22)*

Both the text and context of 8 U.S.C. § 1101(a)(22) support our interpretation of "national of the United States." As discussed below, a number of statutory provisions are difficult, if not impossible, to reconcile with Petitioner's claim that he is not an alien.

1. *Statutory Text*

Section 1101(a)(22)(B) defines "national of the United States" as "a person who, though not a citizen of the United States, owes *permanent* allegiance to the United States." (Emphasis added.) A naturalization applicant cannot rightly be said to owe *permanent* allegiance, because naturalization applications are often denied or withdrawn.[4] It is difficult to

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4. The naturalization application signed by Petitioner does not require the applicant presently to pledge permanent allegiance to the United States. Instead, the application asks only: "*Are you willing* to take the full Oath of Allegiance to the U.S.?" (Emphasis added.) The statement of allegiance signed by an applicant is prospective in nature and, therefore, an applicant does not owe permanent allegiance to the United States until the applicant takes the full oath of

see how a citizen of another country, whose application for naturalization may be denied or withdrawn, nonetheless owes *permanent* allegiance to the United States. *See* 8 U.S.C. § 1101(a)(31) (defining "permanent" to mean "a relationship of continuing or lasting nature, as distinguished from temporary").

Moreover, Petitioner's interpretation creates an absurd result with respect to those persons whose applications for naturalization are, in fact, denied. An applicant for naturalization may renounce his or her statement of allegiance to the United States by withdrawing the application. *United States v. United States Dist. Court ex rel. Chavez-Orozco,* 316 F.3d 1071, 1073 (9th Cir.2003). However, the INS's rejection of a naturalization application does not necessarily invalidate the applicant's statement of allegiance to the United States. Under Petitioner's reading of the statute, therefore, rejected naturalization applicants who do not renounce their statements of allegiance could remain nationals of the United States.[5] Those rejected applicants would not be aliens and, accordingly, would not be removable under 8 U.S.C. § 1227 (providing only for the removal of "aliens"). Congress clearly did not intend this odd construction of the statute.

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allegiance as part of a naturalization ceremony. The applicant may withdraw the application before that occurs. *See* 8 C.F.R. § 335.10 (allowing an applicant to request withdrawal of his or her naturalization application without prejudice to any future application).

5. In fact, this very argument has been made. *See Rodriguez v. Ashcroft*, No. 02Civ.1188, 2003 WL 42018, at *3 (S.D.N.Y. Jan. 6, 2003) (dismissing for lack of jurisdiction a petitioner's claim that, although his application for naturalization had been denied, he was nonetheless a national of the United States because the application had contained a statement of allegiance to the United States).

2. *Statutory Context*

As we have just explained, the text of § 1101(a)(22) supports our holding. The statutory context of that provision further bolsters our interpretation of "national of the United States."

Title 8 U.S.C. § 1101(a)(23) provides that "[t]he term 'naturalization' means the conferring of *nationality* of a state upon a person *after birth, by any means whatsoever.*" (Emphasis added.) Thus, the statutory provision immediately following the definition of "national of the United States" provides that "naturalization" is the path by which a person attains nationality after birth. Section 1101(a)(23) makes no provision for the attainment of nationality short of full naturalization and, therefore, is consistent with our conclusion that one may become a "national of the United States" only through birth or by completing the process of becoming a naturalized citizen.

We find further support for our interpretation of "national of the United States" in 8 U.S.C. § 1408, which lists four categories of persons who are classified as nationals, but not citizens, of the United States. All the categories enumerated in § 1408 relate in some way to birth in an outlying possession of the United States,[6] or birth to parents who are nationals of the United States. *Id.* Under traditional principles of statutory interpretation, the fact that Congress has defined "national" as including only those categories of persons is significant. *See Boudette v. Barnette,* 923 F.2d 754, 756-57 (9th Cir.1991) (noting that the canon of "*expressio unius est exclusio alterius* ... as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions" (citation omitted)).

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6. Title 8 U.S.C. § 1101(a)(29) provides that "[t]he term 'outlying possessions of the United States' means American Samoa and Swains Island."

Petitioner's interpretation of § 1101(a)(22) is also called into doubt by 8 U.S.C. § 1481. That provision sets forth a number of ways in which a "person who is a national of the United States *whether by birth or naturalization,* shall lose his nationality." 8 U.S.C. § 1481(a) (emphasis added). By mentioning only birth and naturalization as reasons why a person would be a national of the United States, § 1481(a) implies that those are the *only* ways in which a person can attain the status of a national.

Perhaps most importantly, Petitioner's interpretation of § 1101(a)(22) cannot be reconciled with 8 U.S.C. § 1429, which provides that "no person shall be naturalized against whom there is outstanding a final finding of deportability ... and no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding." 8 U.S.C. § 1429. The natural reading of this statute is that removal proceedings and final removal orders are to take precedence over naturalization applications. Because the INA permits the removal of aliens only, and § 1429 allows the removal of individuals with pending naturalization applications, it is clear that Congress viewed applicants for naturalization as aliens and not as nationals.

When Petitioner's reading of § 1101(a)(22) is viewed in light of § 1429, it is clear that Petitioner's interpretation would paralyze the INS in cases in which a person files a naturalization application after the INS has instituted removal proceedings.[7] The INA allows the removal of "aliens" only. However, Petitioner argues that a naturalization applicant's statement of allegiance alters his immigration status from that of an alien to that of a national of the United States. Therefore, under Petitioner's interpretation of § 1101(a)(22), if a person were to file a naturalization application after the INS had begun removal

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7. Petitioner argues that § 1429 bars the filing of new applications for naturalization after removal proceedings have been initiated. However, that is not what the text of the statute says.

proceedings against him, the person would thereby become a "national" and the INS would not be permitted to complete the removal proceedings. However, the INS *also* could not act on that person's naturalization application because it would be prohibited from doing so by § 1429. The result would be a catch-22 for the INS, in which the naturalization applicant could be neither removed nor naturalized so long as there was a removal proceeding pending against the applicant. We do not believe that paralysis was Congress' intended result.

3. *Regulatory Context*

The INS has not issued regulations defining "national" under § 1101(a)(22). However, at least one regulation addresses the meaning of "national of the United States" in a different context, and it supports our interpretation of the statute. Title 14 C.F.R. § 1259.101(c) defines "national of the United States" for purposes of a NASA grant program as "a citizen of the United States or a native resident of a possession of the United States. It does not refer to or include a citizen of another country who has applied for United States citizenship."

In summary, the text and context of § 1101(a)(22) support our interpretation of "national of the United States."

D. *Case Law Defining "National of the United States"*

Despite the text and context of § 1101(a)(22), and despite the traditional interpretation of "national of the United States," Petitioner argues that cases decided by this court and others require us to adopt his interpretation of the statute. We disagree.

1. *Hughes* and Other Ninth Circuit Decisions

Petitioner argues, first, that our decision in *Hughes* supports his interpretation of § 1101(a)(22). However, he reads *Hughes* too broadly. In that case, we noted only that

> it appears that, in order for a person who is born outside the United States to qualify for "national" status, the person must, *at a minimum,* demonstrate (1) birth in a United States territory or (2) an application for United States citizenship. Because Petitioner does not meet either of those *minimal requirements, we need not delineate what additional facts (if any) he would have to show.*

255 F.3d at 757 (emphasis added). That is, we expressly declined to decide whether an application for naturalization, standing alone, is sufficient to confer nationality on an alien. Instead, we left that issue open.

No other decision of this court has answered the question at issue here. Nonetheless, one of our post-*Hughes* decisions contains dictum on which the government relies. In *Chavez-Orozco,* 316 F.3d at 1072, a defendant who was charged with illegal entry after deportation argued, as a defense, that he was a national of the United States. The defendant argued that he had completed an application for naturalization and, in doing so, had signed an oath of allegiance to the United States. But the defendant later had asked to withdraw his application, and the INS had granted his request. *Id.* Relying on the withdrawal of the defendant's application, we rejected his argument that he was a national of the United States. *Id.* at 1073.

In doing so, we expressed skepticism toward the idea that a completed application for naturalization alone could be sufficient to make the applicant a national of the United States:

> Chavez's entire defense--that he is a "national" of the United States-- depends upon an oath of allegiance which was part of the application for seeking citizenship which he withdrew. We doubt that one could become a national by merely taking such an oath, but we need not decide that issue.

*Id.* However, *Chavez-Orozco* has no precedential value here because we expressly refused to decide the question now before us.

2. *Decisions of Other Courts*

A number of other courts have weighed in on the meaning of the term "national." The case on which Petitioner relies most heavily is *United States v. Morin,* 80 F.3d 124 (4th Cir.1996). In that case, the defendant argued that he had not violated a federal criminal statute prohibiting the murder of "'a national of the United States, while such national is outside the United States.'" *Id.* at 126 (quoting 18 U.S.C. § 2332(a)). The defendant had solicited the murder of a Mexican citizen who was a lawful permanent resident of the United States. *Id.* The murder was to be carried out while the permanent resident was in the Philippines. The defendant's sole defense was that the permanent resident was not a "national of the United States." *Id.* The government countered by arguing that the permanent resident had completed an application for naturalization and, therefore, was a national because he "'owe[d] permanent allegiance to the United States.'" *Id.* (quoting 8 U.S.C. § 1101(a)(22)). The Fourth Circuit adopted the government's definition of "national," noting that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." *Id.*

*Morin* is directly on point because, although the question of how to define the term "national" arose in a criminal case instead of in a removal proceeding, the Fourth Circuit defined the term for purposes of 8 U.S.C. § 1101(a)(22), the same statute at issue here. Accordingly, *Morin* supports Petitioner's reading of the statute.

Nonetheless, *Morin* does not persuade us. The Fourth Circuit provided no reasoning for its conclusion except for the statement quoted above. The court did not discuss the traditional meaning of "national," the text of § 1101(a)(22), or the apparent inconsistency of other statutory provisions with the court's interpretation of "national of the United States."

Petitioner also relies on two district court cases that, he asserts, support his position. *See Lee v. Ashcroft,* 216 F.Supp.2d 51 (E.D.N.Y.2002); *Shittu v. Elwood,* 204 F.Supp.2d 876 (E.D.Pa.2002). Neither of those cases persuades us. Like Petitioner here, Shittu committed an aggravated felony. The *Shittu* court held that the petitioner's "felony conviction objectively demonstrated his lack of allegiance to the United States and its laws and negated any possible inference of permanent allegiance from his naturalization application." *Id.* at 880. In other words, the holding of *Shittu* does not help Petitioner. In *Lee,* the district court's decision would help him. However, the court focused primarily on the common-sense meaning of "allegiance to the United States," without analyzing other clues as to the meaning of "national of the United States."

## CONCLUSION

In light of the historical meaning of "national" and the text and context of 8 U.S.C. § 1101(a)(22), we hold that a person can become a "national of the United States" under the INA only through birth or naturalization. Accordingly, Petitioner did not change his status from that of an alien to that of a United States national by filing an application for naturalization.

PETITION DENIED

## APPENDIX B

## UNITED STATES DEPARTMENT OF JUSTICE
## EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
## BOARD OF IMMIGRATION APPEALS

In re: JOSE LUIS PERDOMO-PADILLA

INS No. A37-801-426

**Order**

In Removal Proceedings
Appeal

On Behalf of Respondent: Pro se
On Behalf of Service: Barbra A. Hale
Assistant District Counsel

ORDER:

PER CURIAM. The respondent's appeal of an Immigration Judge's March 20, 2001, decision finding him removable and ineligible for relief from removal is dismissed. On appeal the respondent contends that he is a national of the United States as he has reportedly submitted two separate applications for naturalization. *Citing Hughes v. Ashcroft*, 2001 WL 699357 (9th Cir. 2001). In *Hughes v. Ashcroft* the Court of Appeals for the Ninth Circuit found that nationals of the United States could not be subject to removal proceedings, and that in order to qualify as national, a noncitizen resident of the United States must have applied for citizenship. *Id.* We firstly note that as this issue was neither raised before, nor ruled upon by, the Immigration

Judge, it is not now properly before this Board. *See Matter of Edwards*, 20 I&N Dec. 191, 196 n.4 (BIA 1990); *Matter of Garcia-Reyes*, 19 I&N Dec. 830, 832 (BIA 1988). Moreover, both we are bound by precedent, and *Hughes v. Ashcroft* is not controlling in the circuit in which this case arises. *See Matter of Cazares*, 21 I&N Dec. 188 (BIA 1996); *Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989). Furthermore, the Court of Appeals for the Third Circuit, where this case arises, has not indicated its agreement with the holding in *Hughes v. Ashcroft*. Finally, even if the Third Circuit had so held, the respondent has submitted no evidence that he ever, in fact, submitted the claimed applications. As such, this argument is unavailing.

On appeal the respondent maintains that the Immigration Judge erred in not considering a claim for relief under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture). 8 C.F.R. § 208.16(c)(2). In this regard, he maintains that he will be tortured if returned to his native country of Mexico due to his involvement as a police informer. As with the respondent's other argument, this contention was not raised below, and is not now properly before us. Moreover, the record reflects that the respondent was concerned that his co-defendant might threaten his wife and children, who reside in California (Tr. at 37). When asked whether he, himself, feared persecution or torture in Mexico, the respondent unequivocally stated that he did not (Tr. at 39). Given these facts, we find no error on the part of the Immigration Judge in not considering a claim for relief under the Convention Against Torture.

Accordingly, the appeal is dismissed.

Lauren R. Mathan

FOR THE BOARD

## APPENDIX C

UNITED STATES CODE ANNOTATED
TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12--IMMIGRATION AND NATIONALITY
SUBCHAPTER I--GENERAL PROVISIONS

§ 1101. Definitions

(a) As used in this chapter--

(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

Supreme Court, U.S.
FILED
DEC 3 - 2003
OFFICE OF THE CLERK

No. 03-445

# In the Supreme Court of the United States

JOSE LUIS PERDOMO-PADILLA, PETITIONER

*v.*

JOHN D. ASHCROFT, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's filing of an application for naturalized United States citizenship changed his immigration status from that of an alien to that of a national of the United States.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 7 |
| Conclusion | 14 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Carreon-Hernandez* v. *Levi*, 543 F.2d 637 (8th Cir. 1976), cert. denied, 430 U.S. 957 (1977) | 10 |
| *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976) | 4 |
| *Hughes* v. *Ashcroft*, 255 F.3d 752 (9th Cir. 2001) | 7 |
| *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950) | 13 |
| *Miller* v. *Albright*, 523 U.S. 420 (1998) | 4, 8 |
| *Navas-Acosta, In re*, 23 I. & N. Dec. 586 (BIA 2003) | 4 |
| *Oliver* v. *INS*, 517 F.2d 426 (2d Cir. 1975), cert. denied, 423 U.S. 1056 (1976) | 10 |
| *Rogers* v. *Bellei*, 401 U.S. 815 (1971) | 2 |
| *Salim* v. *Ashcroft*, No. 02-2244, 2003 WL 22751083 (3d Cir. July 15, 2003) | 12 |
| *Shomberg* v. *United States*, 348 U.S. 540 (1955) | 9 |
| *United States* v. *Morin*, 80 F.3d 124 (4th Cir. 1996) | 7, 8, 10, 11, 12 |


Statutes and regulations:


| | |
|---|---|
| Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135: | |
| § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)) | 2 |
| § 451(b), 116 Stat. 2196 (to be codified at 6 U.S.C. 271(b)) | 2 |

Statutes and regulations—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* ..... 1
8 U.S.C. 1101(a)(3) ..... 2
8 U.S.C. 1101(a)(22) ..... 2, 3, 4, 7, 8, 11, 12, 13
8 U.S.C. 1101(a)(22)(B) ..... 4, 6, 8, 9, 10, 12
8 U.S.C. 1101(a)(23) ..... 2, 5, 9
8 U.S.C. 1101(a)(29) ..... 8
8 U.S.C. 1101(a)(43)(B) ..... 3
8 U.S.C. 1227(a) ..... 1
8 U.S.C. 1227(a)(2)(A)(iii) ..... 2
8 U.S.C. 1227(a)(2)(B)(i) ..... 2
8 U.S.C. 1252(b)(2) ..... 3
8 U.S.C. 1408 ..... 5, 8, 10
8 U.S.C. 1408(1)-(4) ..... 5
8 U.S.C. 1429 ..... 6, 7, 9, 13
8 U.S.C. 1436 ..... 10
8 U.S.C. 1481 ..... 6
8 U.S.C. 1481(a) ..... 9
18 U.S.C. 1968(a) ..... 11
18 U.S.C. 2331(2) ..... 11
18 U.S.C. 2332(a) ..... 11
21 U.S.C. 841(a)(1) ..... 2
21 U.S.C. 846 ..... 2
8 C.F.R.:
Pt. 325 ..... 10
Pt. 335:
Section 335.10 ..... 9
Pt. 337:
Sections 337.1-337.3 ..... 9
14 C.F.R. 1259.101(c) ..... 8

Miscellaneous:

*Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) ..... 2

# In the Supreme Court of the United States

No. 03-445

JOSE LUIS PERDOMO-PADILLA, PETITIONER

*v.*

JOHN D. ASHCROFT, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 333 F.3d 964. The order of the Board of Immigration Appeals (Pet. App. 16-17) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 23, 2003. The petition for a writ of certiorari was filed on September 22, 2003 (a Monday).

### STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, certain classes of aliens are subject to removal from the United States. See 8 U.S.C. 1227(a). The INA defines the term "alien" to mean "any person not a citizen or national of the United

States." 8 U.S.C. 1101(a)(3). Under 8 U.S.C. 1101(a)(22), "[t]he term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

2. Petitioner is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident alien in 1982. Pet. App. 2-3. In July 1997, petitioner filed with the Immigration and Naturalization Service (INS) an Application for Naturalization as a citizen of the United States, on which he answered "yes" to a series of questions, including the question whether he was "willing to take the full Oath of Allegiance to the U.S." *Id.* at 3.[1]

In October 1999, petitioner was convicted in federal district court, after a guilty plea, of conspiring to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner was sentenced to a term of imprisonment of 30 months, to be followed by four years of supervised release. A.R. 85-88.

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[1] Naturalized citizenship is citizenship that is conferred after birth. See generally *Rogers* v. *Bellei*, 401 U.S. 815, 822 (1971); see also 8 U.S.C. 1101(a)(23) (defining "naturalization" for purposes of INA). On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 451(b), 116 Stat. 2192, 2196 (to be codified at 6 U.S.C. 251(2), 271(b)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) (Justice Department implementing regulations as recodified after Homeland Security Act).

3. In January 2001, the INS commenced removal proceedings against petitioner based on his drug-trafficking conviction. Pet. App. 3; see 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii) and (B)(i). In March 2001, an immigration judge (IJ) determined that petitioner is removable from the United States as charged by the INS, and ordered petitioner removed to Mexico. Pet. App. 3; see A.R. 37-38.

In his administrative appeal to the Board of Immigration Appeals (BIA), petitioner argued that he was not an alien, but rather a national of the United States (and therefore not subject to removal) by virtue of his pending application for naturalized citizenship. Pet. App. 16. In August 2001, the BIA dismissed petitioner's appeal. The BIA determined that petitioner's claim to be a national of the United States had not been presented to the IJ and the IJ had not ruled upon it and, therefore, the claim was not properly before the BIA. *Id.* at 16-17. The BIA further concluded that petitioner's claim of United States nationality failed because, in his removal proceeding, petitioner submitted no evidence that he actually applied for naturalization. *Id.* at 17.[2]

4. The Ninth Circuit denied petitioner's ensuing petition for review. Pet. App. 1-15. The court of appeals concluded that, under 8 U.S.C. 1101(a)(22), a person who is not a national of the United States at birth may become a national of this country only through a grant of naturalization as a citizen and not, as petitioner

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[2] The BIA also determined that petitioner's argument was not supported by any decisions of the Third Circuit, where the BIA apparently believed petitioner's case arose. In fact, petitioner's case was heard by an IJ within the Ninth Circuit and, therefore, judicial review was in the Ninth Circuit. See 8 U.S.C. 1252(b)(2).

argued, by submitting an application for naturalization that contains a statement of willingness to take an oath of allegiance to the United States. Pet. App. 4.

The court of appeals declined to defer to the BIA's determination, in a decision issued after the decision in petitioner's case, that United States nationality may be acquired under the INA only at birth or through a grant of naturalized citizenship. Pet. App. 5 (discussing *In re Navas-Acosta*, 23 I. & N. Dec. 586 (BIA 2003)). Nevertheless, the court independently reached the same conclusion.

The court of appeals first observed that although all citizens of the United States are nationals of the United States, some United States nationals are not United States citizens. Historically, non-citizen nationals have been persons born in outlying territories of the United States (currently, American Samoa and Swains Island). Pet. App. 6-7 (citing, *inter alia*, *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 90 n.1 (1976)). The court determined that the text and structure of the INA are consistent with that traditional understanding that the term "national," when used to describe non-citizens, refers generally to persons born in territories of the United States, and not applicants for naturalized citizenship. Pet. App. 8.

The court emphasized (Pet. App. 8-9) that, under 8 U.S.C. 1101(a)(22), a United States national who is not a citizen of the United States must "owe[] permanent allegiance to the United States." 8 U.S.C. 1101(a)(22)(B). Applicants for naturalized citizenship cannot satisfy that requirement, the court explained, because an application for naturalization "does not require the applicant presently to pledge permanent allegiance to the United States," but rather asks whether the alien is "*willing* to

take the full Oath of Allegiance" in the future. Pet. App. 8 n.4 (internal quotation marks omitted). Thus, the court continued, an alien whose naturalization application is withdrawn or denied will not take the oath of allegiance, and could withdraw any statement of prospective intent to take an oath of allegiance that was made in the naturalization application. *Id.* at 8-9 & n.4.

The court of appeals next relied on 8 U.S.C. 1101(a)(23), which provides that "[t]he term 'naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever." The court noted that "Section 1101(a)(23) makes no provision for the attainment of nationality short of full naturalization and, therefore, is consistent with our conclusion that one may become a 'national of the United States' only through birth or by completing the process of becoming a naturalized citizen." Pet. App. 10.

The court "f[ou]nd further support" for its rejection of petitioner's argument in 8 U.S.C. 1408. Pet. App. 10. Section 1408 identifies four categories of persons who are "nationals, but not citizens, of the United States at birth": (1) persons born in an outlying possession of the United States; (2) persons born abroad to parents who are non-citizen nationals of the United States and who met a requirement of residency in the United States or an outlying possession at the time of the birth; (3) certain persons of unknown parentage found in an outlying possession of the United States; and (4) persons born outside the United States and its outlying possessions to one parent who is an alien and one parent who is a qualifying non-citizen national of the United States. 8 U.S.C. 1408(1)-(4). The court of appeals observed that Congress's listing of those *birthright* non-citizen nationals, without identifying any category of persons who

can attain the status of a non-citizen national *after birth*, "is significant" in this case. Pet. App. 10.

Next, the court observed (Pet. App. 11) that 8 U.S.C. 1481 specifies certain acts (such as obtaining foreign naturalization or serving in a foreign army that is engaged in hostilities against the United States) that, if voluntarily performed by "[a] person who is a national of the United States *whether by birth or naturalization*," terminate United States nationality. 8 U.S.C. 1481 (emphasis added). The court noted that Section 1481, "[b]y mentioning only birth and naturalization as reasons why a person would be a national of the United States, * * * implies that those are the *only* ways in which a person can attain the status of a national." Pet. App. 11.

Finally, the court of appeals pointed to 8 U.S.C. 1429 as a further demonstration that Congress did not intend for aliens who apply for naturalization to be treated, on that basis, as nationals of the United States. Pet. App. 11. Section 1429 states in pertinent part that "no person shall be naturalized against whom there is outstanding a final finding of deportability * * * ; and no application for naturalization shall be considered * * * if there is pending against the applicant a removal proceeding." 8 U.S.C. 1429. The court of appeals determined that "[t]he natural reading of this statute is that removal proceedings and final removal orders are to take precedence over naturalization applications. Because the INA permits the removal of aliens only, and § 1429 allows the removal of individuals with pending naturalization applications," the court continued, "it is clear that Congress viewed applicants for naturalization as aliens and not as nationals." Pet. App. 11. The court noted that, in light of Section 1429, petitioner's reading of Section 1101(a)(22) "would

paralyze" the removal process. *Ibid.* Aliens could file naturalization applications after removal proceedings already had begun, and thereby become nationals ineligible for removal. *Ibid.* Those naturalization applications, moreover, could not be granted, because Section 1429 forbids the naturalization of an alien who is in removal proceedings. Thus, nonsensically, there would be a category of aliens in removal proceedings who could be neither removed nor granted citizenship. *Id.* at 11-12.

The Ninth Circuit rejected (Pet. App. 12-13) petitioner's argument that he is a national of the United States under *Hughes* v. *Ashcroft*, 255 F.3d 752 (9th Cir. 2001). The court of appeals explained that in *Hughes* it had "expressly declined to decide whether an application for naturalization, standing alone, is sufficient to confer nationality on an alien." Pet. App. 13 (citing *Hughes*, 255 F.3d at 757). Although the court of appeals noted that a Fourth Circuit case, *United States* v. *Morin*, 80 F.3d 124 (1996), supports petitioner's construction of Section 1101(a)(22), the Ninth Circuit found *Morin* unpersuasive due to the absence of reasoning in that decision. Pet. App. 14. The Ninth Circuit further concluded (*id.* at 15) that district court cases cited by petitioner either contradict his claim to be a national of the United States or, like *Morin*, did not address the relevant statutory considerations when interpreting Section 1101(a)(22).

## ARGUMENT

The Ninth Circuit correctly determined that the filing of an application for naturalized citizenship does not transform the alien applicant into a national of the United States. That determination is compelled by the language and structure of the immigration laws and

consistent with the interpretation of the Board of Immigration Appeals, see Pet. App. 5-6. It does not conflict with any decision of this Court. The conflict between the instant decision (and a more recent Third Circuit decision) and *United States* v. *Morin*, 80 F.3d 124 (4th Cir. 1996), should have little or no continuing significance, for reasons discussed below. Further review by this Court is not warranted.

1. The Ninth Circuit has correctly interpreted Section 1101(a)(22). As the court of appeals explained (Pet. App. 6-8), petitioner's argument that an applicant for naturalized citizenship who expresses willingness to take an oath of allegiance is a "national" of the United States is contrary to the ordinary understanding—reflected in this Court's decisions, see *ibid.* (citing cases), as well as administrative regulations, see *id.* at 12 (quoting 14 C.F.R. 1259.101(c))—that a non-citizen national of the United States is a person who has been born in an outlying territorial possession of the United States. See 8 U.S.C. 1408 (identifying persons who are "nationals, but not citizens, of the United States at birth" by reference to "outlying possessions" of the United States); 8 U.S.C. 1101(a)(29) (defining "outlying possession" to mean American Samoa and Swains Island); see also *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting).

Petitioner's argument likewise finds no support in the "plain language" (Pet. 14, 15) of Section 1101(a)(22). Section 1101(a)(22)(B) provides that a non-citizen national is someone "who *owes permanent allegiance* to the United States." 8 U.S.C. 1101(a)(22)(B) (emphasis added). Although petitioner stated in his application for naturalized citizenship that he would be "willing to take the full Oath of Allegiance to the U.S.," Pet. App. 3, he has not taken that oath, which would be adminis-

tered (generally in a public ceremony) after a determination of eligibility for citizenship and as part of the formal conferral of citizenship, see 8 C.F.R. 337.1-337.3. It is only at that point that a person loses his status as an alien and transfers his obligations of citizenship and allegiance from his former country of citizenship to the United States. Moreover, in light of the possibility that a naturalization application will be denied or withdrawn, see 8 C.F.R. 335.10, petitioner could not demonstrate, through the mere filing of an application for naturalization, that he owes "permanent allegiance to the United States" under Section 1101(a)(22)(B).

Petitioner's contention that he is a national of the United States conflicts with other provisions of the INA that the court of appeals identified. See Pet. App. 10-12. For example, if petitioner were correct and the pendency of a naturalization application rendered him a national who cannot be removed, then, under 8 U.S.C. 1429, aliens could defeat their removal proceedings by filing naturalization applications (which, also under Section 1429, immigration officials could not process). See Pet. App. 11-12; see also *Shomberg* v. *United States*, 348 U.S. 540 (1955) (applying Section 1429).

Petitioner's argument also is inconsistent with the INA's definition of "naturalization," which means "the conferring of nationality" after birth. 8 U.S.C. 1101(a)(23). If naturalization applications conferred nationality, then, nonsensically, *applicants* for naturalized citizenship would acquire "naturalization" just by applying for it, without any approval or conferral by the government. See Pet. App. 10. Similarly, petitioner's claim that his application for naturalization conferred nationality is at odds with 8 U.S.C. 1481(a), in which Congress referred to the acquisition of the status of a national "by birth or naturalization," without men-

tioning the filing of a naturalization application as a basis for United States nationality. See Pet. App. 11. And, likewise, if petitioner were correct that naturalization applications suffice to confer nationality, then Congress logically would have listed applicants for naturalized citizenship along with birthright nationals as "nationals, but not citizens, of the United States" in 8 U.S.C. 1408. See Pet. App. 10; see also 8 U.S.C. 1436 (providing for naturalization of non-citizen nationals); 8 C.F.R. Pt. 325 (same).

2. Contrary to petitioner's assertions (Pet. 10-13), there is no circuit conflict that warrants this Court's review. The instant decision does not conflict with either *Carreon-Hernandez* v. *Levi*, 543 F.2d 637 (8th Cir. 1976), cert. denied, 430 U.S. 957 (1977), or *Oliver* v. *INS*, 517 F.2d 426 (2d Cir. 1975) (per curiam), cert. denied, 423 U.S. 1056 (1976). Neither of those decisions presented the question in this case, *i.e.*, whether the filing of an application for naturalization demonstrates permanent allegiance to the United States. Instead, the Second and Eighth Circuits determined that aliens who had *not* applied for naturalized citizenship lacked permanent allegiance to the United States under Section 1101(a)(22)(B). See *Carreon-Hernandez*, 543 F.2d at 637-638; *Oliver*, 517 F.2d at 427-428 & n.3. The Second Circuit, moreover, explained in *Oliver*—consistent with the Ninth Circuit's reasoning in this case—that nationality can be established "only at birth; thereafter the road [to changing alien status] lies through naturalization, which leads to becoming a citizen and not merely a 'national.'" *Id.* at 428.

Petitioner does correctly identify (Pet. 11-12) a conflict between the instant decision and *United States* v. *Morin*, 80 F.3d 124 (4th Cir. 1996), concerning the interpretation of Section 1101(a)(22)(B). *Morin* was a crimi-

nal case in which the charges included murder-for-hire, in violation of 18 U.S.C. 1958(a). Section 1958(a) requires, *inter alia*, "intent that a murder be committed in violation of the laws of any State or the United States." To establish that element of the offense, the government argued that the defendant attempted to arrange a murder in the Philippines that would have violated several Virginia murder and conspiracy statutes. Gov't Br. at 10-11, *Morin*, *supra* (Nos. 95-5242 & 95-5300) (*Morin* Br.). In addition, the government defended the district court's determination that the planned murder would have violated 18 U.S.C. 2332(a), which makes it a federal offense to murder a national of the United States who is outside the United States. The government argued that, as used in Section 2332(a) of the Criminal Code, the term 'national' should be understood to include an individual, such as the intended target of Morin's murder plot, who is a lawful permanent resident alien. *Morin* Br. at 12. In a footnote, the government stated that its interpretation of Section 2332(a) "comports with the general definition of 'national' contained in [Section 1101(a)(22)]," which is incorporated into Section 2332(a) through 18 U.S.C. 2331(2). *Morin* Br. at 12 n.3. To support that last point, the government stated, incorrectly, that "given [the intended victim's] pending application for citizenship, it can fairly be said that he owed allegiance to the Untied (*sic*) States." *Ibid.*

The Fourth Circuit agreed with the government that the planned killing in *Morin* would have violated both Virginia law and 18 U.S.C. 2332(a). 80 F.3d at 126-127. In discussing Section 2332(a), the court stated that Morin's intended victim was a national of the United States because he was a permanent resident alien with a pending application for naturalized citizenship. The

Fourth Circuit reasoned, without any citation, that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." *Id.* at 126.

The Fourth Circuit's consideration of Section 1101(a)(22) was unnecessary to the holding in *Morin* because the planned murders also would have violated Virginia law. Moreover, although consistent with the government's alternative argument in that case, the Fourth Circuit's approach is incorrect for the reasons discussed in Point 1, above. In a decision that is designated for publication, the Third Circuit, expressly agreeing with the Ninth Circuit in this case, rejected the reasoning of *Morin* as "wholly unpersuasive" and concluded that "simply filing an application for naturalization does not prove that one 'owes a permanent allegiance to the United States.'" *Salim* v. *Ashcroft*, No. 02-2244, 2003 WL 22751083, at *2 (3d Cir. July 15, 2003) (per curiam). Furthermore, representatives of the United States Attorneys in every circuit, as well as appropriate attorneys within the Criminal Division of the Department of Justice, are being advised of the position stated in this brief concerning *Morin*'s incorrect application of Section 1101(a)(22)(B). Accordingly, no criminal prosecutions should be brought based on the interpretation of "national" stated in *Morin*.

In light of all those considerations, the Fourth Circuit's decision in *Morin* is unlikely to have future significance, and—given the powerful statutory arguments, not considered in *Morin*, why someone in petitioner's position does not qualify as a national—can be expected to be reconsidered by the Fourth Circuit in a removal case under the immigration laws. *Morin* thus

does not establish a circuit conflict that warrants review by this Court.[3]

3. Finally, petitioner suggests (Pet. 16) that the Ninth Circuit's decision in this case might allow immigration officials to "defeat Congressional intent to insulate from removal citizens and nationals by sitting on legitimate applications" for naturalized citizenship. Petitioner's argument seems to be that Congress wanted to protect from removal those criminal and other aliens who are removable but who have applied for naturalized citizenship. Section 1429 disproves that argument. See pp. 6-7, 9, *supra*. Nor is there any indication of improper agency delay in this case. In briefing his case before the BIA, petitioner acknowledged that the processing of his citizenship application may have been delayed or prevented "due to the fact that [petitioner] moved with his family" while the application was pending "and failed to notify the INS of his change of address." A.R. 9-10. After petitioner's drug conviction in 1999, moreover, the INS had clear grounds for declining to grant petitioner citizenship and, instead, commencing the removal proceedings that are at issue in this case.[4]

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[3] The district court decisions on which petitioner relies (Pet. 16-17) do not add meaningfully to the split of authority in the lower courts. None contains substantial analysis of Section 1101(a)(22), and some held that the alien was *not* a national of the United States. There was no issue of United States nationality at all in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), on which petitioner also relies. See Pet. 13 n.5.

[4] Although the court of appeals considered the merits of petitioner's claim to be a national of the United States, the BIA determined (Pet. App. 16-17) that petitioner could not prevail on that argument because, among other reasons, he failed to (1) present it to the immigration judge in his removal proceeding and (2) provide

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2003

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the BIA with record evidence establishing that he applied for naturalization. *Id.* at 17. Although the court of appeals, on February 28, 2003, granted petitioner's motion to take judicial notice of his July 1997 naturalization application, those additional grounds for the BIA's order of removal nevertheless weigh against this Court's review of the nationality issue framed in the petition.

(3)

No. 03-445

Supreme Court, U.S.
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# In the Supreme Court of the United States

JOSE LUIS PERDOMO PADILLA, *Petitioner*,

v.

JOHN ASHCROFT, ATTORNEY GENERAL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITIONER'S REPLY BRIEF

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## TABLE OF CONTENTS


| | Page |
|---|---|
| ARGUMENT | 1 |
| I. THE UNITED STATES CONCEDES THE EXISTENCE OF A CIRCUIT SPLIT | 2 |
| II. THE STATUTORY ARGUMENTS OF THE UNITED STATES ARE UNPERSUASIVE | 6 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

*Action S.A. v. Marc Rich & Co., Inc.*,
951 F.2d 504 (2d Cir. 1991) ..... 7

*Asemani v. Islamic Republic of Iran*,
266 F. Supp. 2d 24 (D.D.C. 2003) ..... 4

*Carreon-Hernandez v. Levi*,
543 F.2d 637 (8th Cir. 1976),
*cert. denied*, 430 U.S. 957 (1977) ..... 4

*Davis v. Dist. Dir., Immigration and Naturalization Serv.*,
481 F. Supp. 1178 (D.D.C. 1979) ..... 7

*Holmes v. United States*,
391 U.S. 936 (1968) ..... 10

*Hughes v. Ashcroft*,
255 F.3d 752 (9th Cir. 2001) ..... 3, 4

*Iguarta De La Rosa v. United States*,
229 F.3d 80 (1st Cir. 2000) ..... 4

*In re Miegel*,
272 F. 688 (E.D. Mich. 1921) ..... 10

*Johnson v. Eisentrager*,
339 U.S. 763 (1950) ..... 5

*Lee v. Ashcroft*,
216 F. Supp. 2d 51 (E.D.N.Y. 2002) ..... 4

*Oliver v. INS*,
517 F.2d 426 (2d Cir. 1975)
*cert. denied*, 423 U.S. 1056 (1976) ..... 4

*Petition of Kazuichi Tsuji*,
119 F. Supp. 68 (N.D. Cal. 1953) ..... 10

*Richards v. Sec'y of State, Dep't of State*,
752 F.2d 1413 (9th Cir. 1985) ..... 7

*Salim v. Ashcroft*,
No. 02-2244, 2003 WL 22751083 (3d Cir. July 15, 2003) ..... 2, 3

*Shekoyan v. Sibley Int'l Corp*,
217 F. Supp. 2d 59 (D.D.C. 2002) ..... 4

*Shittu v. Elwood*,
204 F. Supp. 2d 876 (E.D. Pa. 2002) ..... 4

*TRW Inc. v. Andrews*,
534 U.S. 19 (2001) ..... 8

*United States v. Morin*,
80 F.3d 124 (4th Cir. 1996) ..... 2, 4

*Vance v. Terrazas*,
444 U.S. 252 (1980) ..... 7

**STATUTES**

8 U.S.C. § 1101(a)(22)(B) ..... passim
8 U.S.C. § 1101(a)(23) ..... 6
8 U.S.C. § 1101(a)(31) ..... 9
8 U.S.C. § 1408 ..... 8
8 U.S.C. § 1429 ..... 8
8 U.S.C. § 1481 ..... 7
8 U.S.C. § 1481(a) ..... 7

## ARGUMENT

The United States concedes that there is now a square conflict between the Fourth Circuit and the Ninth and Third Circuits, but suggests that this conflict will resolve itself without this Court's intervention because the Fourth Circuit will inevitably reverse itself. That is pure speculation. It also ignores the depth and complexity of the conflict. The Second and Eighth Circuits have endorsed a middle ground between the Fourth Circuit's view that filing a naturalization application conclusively proves "permanent allegiance" and the Ninth Circuit's position that such allegiance can be acquired only by birth or naturalization. While joining the Ninth Circuit's side of the divide, the Third Circuit seems to simultaneously reserve the possibility that it may approve a slightly more moderate interpretation in limited circumstances. These conflicts will not resolve themselves, and this Court should not tolerate the current division among the circuits on a question of such fundamental importance as nationality.

Furthermore, the United States' statutory arguments consistently ignore the distinction between nationality and actual citizenship. The United States argues, for example, that it is only upon "the formal conferral of citizenship" that a person "loses his status as an alien and transfers his obligations of citizenship and allegiance." Brief in Opposition ("Opp.") at 9. That view cannot be squared with the statute, which defines the term "national of the United States" as "a person who, *though not a citizen of the United States*, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B) (emphasis added).

## I. THE UNITED STATES CONCEDES THE EXISTENCE OF A CIRCUIT SPLIT

The United States concedes that Petitioner has correctly identified a conflict between the instant Ninth Circuit decision and the Fourth Circuit decision in *Morin*, Opp. at 8, 10, which held that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996). Indeed, the United States acknowledges that this conflict was recently deepened by the Third Circuit's decision in *Salim v. Ashcroft*, No. 02-2244, 2003 WL 22751083 (3d Cir. July 15, 2003). Opp. at 12. The United States argues that this conflict does not warrant review because (a) it has advised federal prosecutors that "the Fourth Circuit's approach is incorrect," and instructed them not to bring any more criminal prosecutions on the *Morin* theory and (b) given the "powerful statutory arguments" articulated by the Ninth Circuit in this case, the Fourth Circuit can be expected to "reconsider" its decision in an immigration removal case. *Id.* Those submissions are wide of the mark.

First, the criminal context in which this issue arose in *Morin* was unusual and is unlikely to recur in any event. *Morin* is important because its interpretation of 8 U.S.C. § 1101(a)(22)(B) is also binding circuit precedent in immigration removal cases like this one. The fact that the United States may have advised federal prosecutors not to bring any more criminal cases on the *Morin* theory is therefore beside the point. As the cases cited in the Petition illustrate, this conflict will continue to plague the federal courts—in the Fourth Circuit and elsewhere—even if the United States never brings another criminal case like *Morin*.

Second, the Fourth Circuit decision has been binding precedent in that circuit for seven years and has also been positively embraced by district courts throughout the nation. The United States' suggestion that the Fourth Circuit will take the issue *en banc* and reverse itself is, at this juncture, nothing more than sheer conjecture.

Regardless, the circuit split is both deeper and more complex than the United States recognizes. In *Salim*, the Third Circuit held that, "[a]lthough we have not had the occasion to decide *what a petitioner must show* to prove he 'owes permanent allegiance . . .' we now join the Court of Appeals for the Ninth Circuit in holding that *simply* filing an application for naturalization does not prove that one 'owes permanent allegiance . . . .'" 2003 WL 22751083 at *3 (emphasis added). Unlike the rigid view of the Ninth Circuit, the Third Circuit seems to leave open the possibility that various forms of evidence might be relevant on the question of "permanent allegiance." On the other hand, the Third Circuit appears to simultaneously foreclose the possibility of considering anything "less than citizenship" to show "permanent allegiance to the United States" where someone is "a citizen of another country."[1] *Id.* The ambiguities in the Third Circuit's opinion underscore the current jurisprudential chaos and the urgent need for direction from this Court.

The Second and Eighth Circuit cases suggest a middle ground between the Ninth Circuit's view that national status is purely a matter of birth or naturalization and the Fourth Circuit's holding that an application for naturalization, standing alone, is enough. *See Oliver v. INS*,

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[1] A person may have no foreign citizenship and still not be either a United States citizen or born in a United States territory. *See, e.g., Hughes v. Ashcroft*, 255 F.3d 752, 756-57 (9th Cir. 2001).

517 F.2d 426, 427-28 (2d Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1056 (1976); *Carreon-Hernandez v. Levi*, 543 F.2d 637, 637 (8th Cir. 1976), *cert. denied*, 430 U.S. 957 (1977). The United States points out that the Second and Eighth Circuits held, on the facts there presented, that "aliens who had *not* applied for naturalized citizenship lacked permanent allegiance to the United States under Section 1101 (a)(22)(B)." Opp. at 10. The Second and Eighth Circuits' reasoning was that "national" status cannot be conferred in the absence of official indicia of permanent allegiance, such as the filing of an application for naturalization. This reasoning implicitly rejects the Ninth Circuit's extreme ruling that a person can become a national only by birth or naturalization.[2] Even if the United States fails to grasp the core reasoning of these cases, a number of district courts cite both *Oliver* and *Carreon-Hernandez*, along with *Morin*, to support their finding that a pending application for naturalization can constitute evidence of "permanent allegiance."[3]

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[2] The First Circuit did not purport to consider, construe or otherwise adjudicate the scope and meaning of the term "national." To the extent that the court's passing observation in a footnote in *Iguarta De La Rosa v. United States* that "[t]he only persons currently holding the status [of nationals] are residents of American Samoa and Swains Island" can be deemed to lend support to the Ninth Circuit's holding, Petitioner submits that it only deepens the split among the Circuits. 229 F.3d 80, 86 n.12

[3] *See, e.g., Asemani v. Islamic Republic of Iran*, 266 F. Supp. 2d 24, 26-27 (D.D.C. 2003) (relying on *Hughes*, *Morin*, *Oliver* and *Carreon-Hernandez* to conclude that plaintiff had demonstrated permanent allegiance to the United States to qualify as a national where he pursued an application for citizenship and filed an oath of allegiance to the United States); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 66-67 (D.D.C. 2002); *Lee v. Ashcroft*, 216 F. Supp. 2d 51, 57-58 (E.D.N.Y. 2002); *Shittu v. Elwood*, 204 F. Supp. 2d 876, 879 (E.D. Pa. 2002)

The United States argues as if the only issue in this case is whether an application for naturalization, standing alone, proves that the applicant owes "permanent allegiance to the United States." While this is the law in the Fourth Circuit, it is not Petitioner's sole position. Petitioner also contends that the statutory language should be taken seriously, and that although an application for naturalization may not always conclusively establish "permanent allegiance," it (along with factors like living legally in the United States for decades and raising several U.S. citizen children) is surely probative evidence entitled to some consideration. That appears to be the law in the Second and Eighth Circuits. These courts, along with the Fourth Circuit, have rejected the Ninth Circuit's blanket rule, which ignores the facts and circumstances indicating allegiance in a particular case and holds that nationality can only be attained by birth or naturalized citizenship.[4] The complexity of this conflict underscores the crucial need for this Court to

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(recognizing the split among circuits on indicia of "national status" under Section 1101(a)(22)(B)).

[4] The United States' cursory dismissal of *Johnson v. Eisentrager*, on the grounds that "there was no issue of United States nationality," misses the point—that this Court has identified the application for citizenship as a milestone for increased rights in our society in the process of acquiring the full rights of citizenship. 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950) (observing that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.").

intercede and provide a definitive resolution—and proves that these issues will not go away even if the Fourth Circuit reconsiders.

## II. THE STATUTORY ARGUMENTS OF THE UNITED STATES ARE UNPERSUASIVE

The United States argues that Petitioner's interpretation is inconsistent with the history, structure and plain language of the Immigration and Nationality Act ("INA"). That is incorrect.

First, the United States contends that Petitioner's view is "contrary to the ordinary understanding . . . that a non-citizen national of the United States is a person who has been born in an outlying territorial possession of the United States." Opp. at 8. While Petitioner agrees that this group of persons has traditionally been designated as non-citizen nationals, this Court has never held that non-citizen nationals can *only be* those persons born in outlying territorial possessions. If Congress had wanted to confine the term that way, it could easily have done so. Instead, it has mandated that a "national of the United States" is "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B).

Second, the United States' statutory construction arguments repeatedly conflate the distinction expressly drawn by 8 U.S.C. § 1101(a)(22)(B) between nationality and citizenship. Many provisions within Title 8 use the terms "national" and "nationality" in a looser sense, as a synonym for "citizen" or "citizenship," and are therefore unhelpful when interpreting a statute that expressly distinguishes those concepts. For example, the United States points to 8 U.S.C. § 1101(a)(23), which defines naturalization as the "conferring of nationality of a state upon a person after birth, by any means whatsoever." The United States claims that

"[i]f naturalization applications conferred nationality, then, nonsensically, *applicants* for naturalized citizenship would acquire 'naturalization' just by applying for it, without any approval or conferral by the government." Opp. at 9. That makes sense only if you accept the premise that nationality and naturalized citizenship are the same thing. Clearly, when § 1101(a)(23) talks about the "conferring of nationality" it really means the "conferring of citizenship." That is what naturalization has always meant, and any other reading would render §1101(a)(22) self-contradictory.

Similarly, Petitioner's position is not "at odds with 8 U.S.C. 1481(a)." Opp. at 9. Section 1481 discusses "[l]oss of nationality by native-born or naturalized *citizen[s]*," and not by non-citizen nationals. 8 U.S.C. § 1481 (emphasis added). Therefore, it is another example of a provision within Title 8 that uses the terms "national" and "nationality" in a looser sense, as a synonym for "citizen" or "citizenship," rather than as more precisely defined in § 1101(a)(22)(B). This becomes further evident in reviewing cases that address loss of such "nationality" pursuant to § 1481. Such cases involve the loss of citizenship by naturalized or natural-born citizens and not loss of nationality by individuals who have attained status, by birth or otherwise, as a non-citizen national. *See, e.g., Vance v. Terrazas*, 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980); *Action S.A. v. Marc Rich & Co., Inc.*, 951 F.2d 504 (2d Cir. 1991); *Richards v. Sec'y of State, Dep't of State*, 752 F.2d 1413 (9th Cir. 1985); *Davis v. Dist. Dir., Immigration and Naturalization Serv.*, 481 F. Supp. 1178 (D.D.C. 1979).

The United States next argues that because 8 U.S.C. § 1408 sets forth four categories of persons classified as nationals but not as citizens, all of which relate to birth in an outlying possession of the United States, it necessarily indicates that Congress intended to exclude all others from

this category. Opp. at 10. Section 1408 is specifically entitled "[n]ationals but not citizens of the United States at birth." 8 U.S.C. § 1408. By its very title, § 1408 is not meant to include those persons who attain non-citizen, national status after birth. If Congress had intended to limit the application of § 1101(a)(22)(B) to those categories set forth in § 1408, it could easily have done so expressly—and there was no need to include the phrase "owes permanent allegiance to the United States" at all. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) (citation omitted).

Finally, the United States complains that Petitioner's interpretation of the statute creates a trap in which some aliens will not be able to be removed but can also not be naturalized. Opp. at 9 (referring to 8 U.S.C. § 1429). This is simply another example of the United States' attempt to conflate citizenship and nationality. The United States assumes that everyone who is not a citizen and cannot become one should be removable. But Congress clearly decreed otherwise, recognizing that a person "who, *though not a citizen of the United States*, owes permanent allegiance to the United States" should not be removed. 8 U.S.C. § 1101(a)(22)(B). The fact that some detainees who applied for citizenship before removal proceedings were initiated may escape removal is not "paralysis," Pet. App. 11, but exactly what Congress intended. Petitioner does not suggest that every detainee who files an application for citizenship can avoid removal on that basis alone. Rather, as the Petition makes clear, a pending application may be sufficiently compelling evidence of permanent allegiance. At any rate, a pending application is, at a minimum, *some*

relevant evidence of permanent allegiance, which should be considered along with other factors.

The United States also suggests that even if the words "owes permanent allegiance" are interpreted in accordance with their plain, ordinary meaning, the filing of a naturalization application is insufficient evidence of such allegiance because applicants have merely indicated a willingness to take the oath of allegiance and have not actually taken such oath.[5] Opp. at 8. The United States urges that it is unreasonable to infer from a willingness to take an oath that a person in fact owes allegiance to the United States. Opp. at 8-9. However, it is vastly more unreasonable to infer, as the United States and the Ninth Circuit would have it, that *none* of the persons who have indicated a willingness to swear an oath to that effect do indeed owe "permanent allegiance" to the United States. The filing of a naturalization application, which entails meeting numerous statutory criteria including lengthy residence in the United States and a written declaration, sworn under penalty of perjury, of willingness to take a public oath of allegiance, cannot be taken lightly.[6] Certainly,

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[5] The INA defines the word "permanent" as "a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." 8 U.S.C. § 1101(a)(31). Petitioner's willingness to take the oath, therefore, does not lack permanence in the statutory sense merely because he might withdraw it or the United States might reject it.

[6] As the Petition makes clear, the INS failed to consider Petitioner's naturalization application for nearly five years. Pet. at 16, n.8.

completing such meaningful and significant steps toward citizenship is *probative evidence* of permanent allegiance.[7]

In any event, the United States' and the Ninth Circuit's suggestion that actually taking the citizenship oath is the only way to prove permanent allegiance to the United States is absurd, because it renders the statute facially self-contradictory. Section 1101(a)(22)(B) defines a national as "a person who, *though not a citizen of the United States*, owes permanent allegiance to the United States." (emphasis added). The United States' view that it is only upon "the formal conferral of citizenship" that a person "loses his status as an alien and transfers his obligations of citizenship and allegiance," Opp. at 9, is therefore blatantly inconsistent with the statute. Congress clearly recognized in § 1101(a)(22)(B) that some persons who are not citizens owe permanent allegiance to the United States and said so in unmistakable terms.

## CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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[7] Congress has historically recognized that an individual's allegiance to the United States is demonstrated by the filing of an application for naturalization. *See, e.g., Petition of Kazuichi Tsuji*, 119 F. Supp. 68, 71 (N.D. Cal. 1953) (recognizing that the Act of May 18, 1917 made not only all male citizens, but also "male persons residing in the United States, not alien enemies, who have declared their intention to become citizens," eligible for the draft); *In re Miegel*, 272 F. 688, 697 (E.D. Mich. 1921); *Holmes v. United States*, 391 U.S. 936, 940 n.4, 88 S. Ct. 1835, 1838, 20 L. Ed. 2d 856 (1968).

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